UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	No. SA-16-CR-574(1)-DAE
	)	
NICHOLAS ANDREAS GONZALEZ-MALVEN,	)	San Antonio, Texas
	)	February 22, 2018
Defendant.	)	
	)	

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE DAVID A. EZRA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings reported by stenotype, transcript produced by computer-aided transcription.

(Open court at 1:34 p.m.)

THE COURTROOM DEPUTY: SA-16-CR-574, *United States of America versus Nicholas Andreas Gonzalez-Malven*.

MS. THOMPSON: Good afternoon, Your Honor. Tracy Thompson appearing on behalf of the United States.

THE COURT: All right. Good afternoon.

MR. KIMBROUGH: Your Honor, Brian Kimbrough appearing on behalf of Mr. Malven.

THE COURT: All right. Mr. Kimbrough, are you -- have you had a full and ample opportunity to go over the presentence investigation report and to make any objections you wish to make?

MR. KIMBROUGH: I have, Your Honor.

THE COURT: And you've discussed it with your client?

MR. KIMBROUGH: Yes, Your Honor.

THE COURT: All right. On June 14th of 2017, the defendant pled guilty to two counts of production of child pornography, in violation of 18 United States Code Section 2251(a), Counts 1 and 2 of a ten-count indictment. Pursuant to the plea agreement, the government has agreed to recommend a three-level reduction for acceptance of responsibility. And I believe that was done.

The Court has carefully reviewed the Rule 11 plea agreement in this case in conjunction with the presentence investigation and report. And I am satisfied that it does adequately reflect

the seriousness of the offense behavior and does not undermine the statutory purposes of sentencing. And the plea agreement is hereby accepted without objection.

There were no objections to the factual statements in the presentence report, and the Court adopts those as its findings of fact.

There was, however, certain objections to the guideline computation. The Court adopts those portions of the guideline computation as to which there were no objections, and would address the objections as follows:

The defendant objects to paragraphs 20 through 27 in the victim impact statement, arguing that the Mandatory Victim Restitution Act of 1996 applies only to the victim in Counts 1.

That objection will be overruled. The defendant should carefully read paragraph 22, which clearly states that the child victim associated with Counts 1 and 2 is entitled to the agreed restitution.

Objection number two, the defendant objects to paragraph 34 because the defendant's conduct allegedly does not meet the definition for a sexual act or sexual conduct, which specifically states "contact" means the intentional touching of the genitalia, anus, groin, breast, inner thigh or buttocks. The defendant declares his conduct included "pants are being pulled down, exposing his buttocks, and a finger is touching the area between his buttocks."

That objection is going to be overruled. The defendant's conduct clearly meets the definition of sexual contact as outlined in 18 USC 2246(3) by touching any area of the buttocks. However, it is represented by the defendant in the presentence report that he penetrated the anus of the child victim with his finger, specifically paragraphs 13, 14 and 15.

Communications with Michael Lee Kiper, wherein the defendant described graphically inserting his finger into the anus of the child victim and then distributed pictures as proof to Kiper. Given this admission, the defendant's conduct meets the definition of 18 USC 2246(2)(C) which includes "the penetration, however slight, of the anal or genital opening of another by hand or finger." So that is overruled.

Objection number three, the defendant objects to enhancement at paragraph 36 because he asserts that the child victim in Counts 1 and 2 does not meet the definition of a toddler.

The enhancement is appropriately applied in this case because it is applicable. The defendant -- the Court notes U.S. Sentencing Guideline 1B1.3(a)(1)(A) which defines relevant conduct as all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant. And that occurred during the commission of the instant offense.

The defendant should also note U.S. Sentencing Guideline

6B1.4, comment N, which states, "The Court is also not obligated to accept the stipulations of the parties. Even though stipulations are expected to be accurate and complete, the Court cannot rely exclusively upon stipulations in asserting the factors relevant to the determination of sentence. Rather, in determining the factual basis of the sentence, the Court will consider the stipulation together with the results of the presentence investigation and other relevant information."

Here, the defendant was found to possess 83 images of child pornography of which images depicted toddlers. So the objection is overruled.

Objection number four, the defendant objects to enhancement at paragraph 42 because he asserts there is insufficient evidence to establish a pattern of prohibited sexual conduct. The Court would note that the defendant pled guilty to Counts 1 and 2 which occurred on June 28th and July 21, both of 2016. Under U.S. Sentencing Guideline 4B1.5, the general definition of "pattern of activity" means the defendant engaged in a pattern of activity involving prohibited sexual conduct if on at least two separate occasions the defendant engaged in prohibited sexual contact with a minor. There were -- there is evidence of other contact. However, this in and of itself meets the definition. So the objection is overruled.

The offense level is 43. The criminal-history category is

one. As to Count 1, the imprisonment range is 360 months. Guideline imprisonment range as to Count 2, 360 months. Counts 1 and 2 to run consecutively.

Supervised release as to Count 1, five years to life. As to Count 2, five years to life.

A fine as to Count 1 of 50,000 to $500,000; as to Count 2, 50,000 to $500,000.

Restitution on Count 1, $3,000; Count 2, $3,000.

Special assessment of $200. That's $100 per count.

And the JVTA is $5,000 as to Count 1; and Count 2, $5,000.

All right. I'll hear from counsel for the defendant.

MR. KIMBROUGH: Your Honor, I understand the Court's position. I would ask the Court to run these counts consecutively and not concurrently. And I would rely on some of the points I made in my sentencing memorandum.

THE COURT: Which I've reviewed.

MR. KIMBROUGH: Thank you, Your Honor.

I'll also point out, this case is related to the Kiper case, which I know the Court heard. Now, the cases are not the same. I'm not saying that they're the same in terms of facts. But the images that Mr. Malven was sending were being sent to Mr. Kiper. And so they were related to each other. And I know that Mr. Kiper has a different situation, but -- and I believe the Court sentenced him to 240 months.

Now, Mr. Malven I believe should get 360 months. He should

get the statutory maximum. But I would ask the Court to consider running the cases concurrently. He has no criminal record of any kind. He is honorably discharged from the military. His family is present here, Your Honor, on his behalf. He has a great deal of family support.

He made a great error. I don't know if the Court is considering the other allegations that were made from the daycare center. That was the purpose of my objection. I understand the Court's ruling, and I don't object to the Court's ruling concerning the pattern based on the two images. But there is insufficient evidence to consider that he is a danger to the other children when he was working there. He denies that. However, he fully admits what he did was a violation not only of the victim but of his role as a caretaker of children.

He has a disability. He has a disease. He has something that's wrong with him. But it can be dealt with in treatment in prison. And I ask the Court to consider a concurrent sentence to at least allow him the possibility of living in the future.

That's all I have.

THE COURT: Does your client wish to address the Court?

MR. KIMBROUGH: Yes, Your Honor.

THE COURT: All right.

THE DEFENDANT: Your Honor, first off, I would like to apologize to the victim and their family and to the ladies and gentlemen of the court. I want to apologize to my family. I know what I did was wrong. I regret it very much so. I have not had a day where I don't think about what I've done. And if I could take it all back, I would.

And I know that this action does not define who I am as an individual. And I do hope that in the future I can have a chance for redemption and that I can prove to people that I am a good person, and I did not -- I did not wish for any of this to happen. And I hope you can take that into consideration.

That's all.

MS. THOMPSON: Your Honor --

THE COURT: Ms. Thompson.

MS. THOMPSON: Thank you. The government's asking for a consecutive sentence. It's not appropriate that the defendant chose to sexually exploit this child on multiple occasions. And he shouldn't be rewarded for, Hey, once I sexually assaulted that child, if I keep assaulting that child, they'll just run the sentences concurrent; or, I won't get additional time each time I go back and sexually exploit that child. So that's one of the reasons.

The other is, Mr. Malven, by working at the daycare, was very well aware of the fact that the child he sexually exploited in this case had been sexually abused before by a

nonfamily member. And the fact that he picked that child to sexually exploit, who had been victimized before in his short four years, makes it even more atrocious.

This is not -- when he says, This action doesn't define me as a person, it wasn't one action. This is a series of actions. He can blame Mr. Kiper all he wants, but he has been viewing and masturbating to child pornography for at least five years. That's well before Mr. Kiper came into his life and he started that relationship.

I will agree that the relationship he had with Mr. Kiper helped fuel this activity. It normalized his sexual interest in children. But when you read the chats between those two individuals, it's not just about having a sexual interest in children. They chat and plan to sexually torture children, shoving sex organs in their mouths so that they can't hear them scream. The detail is beyond disturbing, what they were chatting about.

So to say that -- to indicate sort of he had a bad day or this is a small thing that he did wrong, misses the entire point. He has a very strong sexual interest in children. He's acted out on it.

I disagree that he's not a danger to all children. He is a danger to every child. He was working in a daycare facility and taking pictures of his own penis laid out on the sink. There's a video of him masturbating in the bathroom of the

daycare facility. He is a danger to all children in society, and that has to be taken into consideration.

One of the things law enforcement found at his apartment that I thought was really interesting and disturbing in the same way is that he filed a complaint with the daycare that he worked at in Washington state because he wasn't given access to younger children. And in the complaint he indicates that it might be because he's male.

But he complained about not having access to younger children, younger children who aren't able to verbalize what is happening to them or aren't as easily believed as older children who are much more articulate and have a better memory and can articulate what's happened to them.

He didn't just send these images to Michael Kiper. He sent them to other people who have a sexual interest in children. He's communicating with a lot of different people that have expressed a sexual interest in children, one of them known as Open Guy, who was arrested and investigated in the Austin Division. So it's not limited to, Michael Kiper made me do it. This is a big part of who he is. It's not all of who he is, but it is a big part of who he is.

When he and Mr. Kiper would get together on their own, one of the things they would do is view child pornography. That's part of what created a sexual atmosphere for them. He discussed with Kiper their interest in molesting a two-year-old

child. In fact, Mr. Kiper made arrangements to engage in sexual activity with a two-year-old, and he made arrangements with the FBI to engage in that activity, Agent Allovio working undercover.

Now, Mr. Kiper didn't go through with that activity. He never showed up, and he called that off. But one of the things he talked about and one of the things he shared with Mr. Malven and others was his knowledge of how to sexually assault a small child and use medication and ice and some different kind of sleeping aids to make the child groggy or fall asleep, and then ice and I think hemorrhoid cream and something else to put on their anuses to cover up any physical evidence of sexual abuse before they go back to their parents.

It was more than -- and I don't know how to say this without minimizing the conduct. The production of child pornography that he engaged in at the daycare, that was horrific. But what these two planned to do and talked about doing and normalized was torturing young children.

And all this is going on when this man knew he had a communicable disease that he could very easily be spreading to other people, especially working at a daycare, helping children go to the bathroom. This is not -- this isn't an action. It's a series of actions, years of actions. And I disagree. It is a big part of who he is.

And because of all the facts and circumstances in this case

put together, the government is asking for a guideline sentence, which in this case is 720 months.

THE COURT: All right. Well, these are some of the more, and most, difficult cases a judge has to deal with. It's why many senior judges, who have the option of doing so, relieve themselves of the responsibility to hear criminal cases. But somebody has to do it. And in a busy district like this, I just can't step away from those responsibilities, and I won't.

You know, in looking at this case, I have kept in mind the responsibility that I have to act in a measured and careful manner and follow the tenants of the Supreme Court, specifically Justice Kennedy when he said that you must, in judging the case, not just look at the acts, but you must look at the whole person. And I try to do that in every sentencing.

And these cases are, of course -- and this one in particular I think is of a kind and nature which raises the average person's sense of outrage. There are very few things in our society that are less tolerated than violence against children or sexual abuse against children. And that's primarily because children are the wards of our custody. They have and should have the protection of their parents and those who care for them and those who are entrusted to care for them. And when that trust is violated and it is violated in a manner such as this, it creates a difficult and very trying scenario.

You know, I recently watched a judge on television pronounce sentence against the doctor who abused all of those young Olympic athletes. I agreed with the sentence that he received, but I didn't agree with the manner in which he handed down that sentence, sarcastically tearing up victim statement -- not victim statements -- perpetrator statement and making a show of the sentencing as if the sentencing was some sort of carnival. A sentencing is not a carnival. A sentencing is a very serious and important judicial proceeding that invokes the most contemplative effort by all involved.

What is unusual about this case and particularly, particularly troubling is that it hits at the very heart of a fact of life for working parents in our community. Most people, if they were given the choice, would like to be able to be around their children 24/7, or when they're not in school. But the fact of life is that today, economic realities as well as the legitimate -- and I say legitimate aspirations of women to exercise themselves to their full potential, calls upon them to entrust their children to daycare so that they can work and provide for their families, just as their partner or husband provides. And we have it in this courthouse. We have it in all of the working world here in San Antonio and throughout this country.

And, unfortunately, we have a situation in this case where a person who was given that sacred trust by the parents took

advantage of it for his own personal gratification on multiple occasions, not just committing a crime against these children, the sexual abuse, which was certainly horrific and bad enough, but violating the trust of these parents, and for that matter even the daycare operator, and created a scenario here that is every parents' worst nightmare, that has their children in any type of a daycare environment.

Short of -- short of the child being killed or very seriously injured, this is right up there with the thing that parents fear the most, and they have every right to expect will never happen. But, unfortunately, in this case it did.

Now, I have looked very carefully at all of the 3553 factors. I've studied this case in great depth and detail. And I have been sentencing defendants in federal court for the 30 years I've been a federal judge. And I don't remember a case that I have spent as much time on as I spent on this, looking over the history and the background and the situation involving this child.

The guidelines in this case are severe. There's no question about it. Each count carries a 360-month or 30-year term of imprisonment. And that, we have to remember, is without the possibility of parole.

I have to say that what has bothered me the most is trying to reconcile the substantial length of imprisonment with the serious nature of the defendant's misconduct here. I've

handled a lot of -- I'm sorry to say, I've handled a lot of child pornography cases. Most of them are individuals who collect pornography. We don't get many production cases because a lot of the production occurs overseas. A lot of it occurs here, too, but I haven't seen many production cases. Maybe other judges have other experience, and maybe the U.S. Attorney's office or the FBI here has other experience. I don't know. But I haven't seen a lot of production cases as compared to possession cases. I see many more possession cases than I do production cases.

And it's also true that a lot of these images circulate for years. And that's one of the problems, is that these images get out there, and they never disappear. They just keep recirculating. So, I mean, I've had cases from 15 years ago, and I see the same images -- I don't see them because I don't look at them, but I see them described -- that I had 15 and 20 years ago. They're still floating around. And every time somebody looks at them, these people are being revictimized.

I don't know whether the images in this case ever made it to the internet. I have no evidence of that. I have evidence that they were transmitted to other people. And these are people that do put things up on internet and trade them. So I would not be surprised that these images didn't find their way in one shape or form onto the -- onto the internet, where they'll be passed around and shared. I don't know that, and

I'm not sentencing the defendant as if that occurred. But I would not be surprised if it -- if it didn't.

But he did share them. And he did put these images that he took in the, kind of, chain of commerce so to speak so that there was a serious likelihood that they would be shared on the internet. And that is a serious problem.

So not to belabor the point, this Court has, as I said, carefully looked at all the 3553 factors. And it is the judgment of the Court, pursuant to the Sentencing Reform Act of 1984, that the defendant is hereby sentenced to a term of imprisonment as to Count 1 of 360 months.

The Court has carefully considered the suggestion that the second count should not run consecutively. The Court, after having a very difficult time and looking at it very carefully, has concluded that it should run consecutively. And -- however, I do believe that a second 360-month term is simply too long. So it is the judgment of this Court that the defendant is hereby sentenced as to Count 2 to a term of 180 months, or 15 years. The total term of imprisonment is 45 years.

That will be followed by ten-year term of supervised release as to Counts 1 and 2. And those should run concurrently rather than consecutively.

During the term of supervised release, the defendant shall abide by all standard conditions adopted in the Court's

November 28, 2016 order. The defendant shall participate in a sex-specific -- an offense-specific treatment program and submit to periodic polygraph testing at the direction of the probation officer as a means to ensure compliance with the requirements of supervision or the treatment program. The defendant shall follow the rules and regulations of the program. The probation officer will supervise the defendant's participation in the program.

The defendant shall allow the probation office to install computer monitoring software on any computer, as defined in 18 USC 1030(e)(1), the defendant uses. To ensure compliance with the computer monitoring condition, the defendant shall allow the probation office to conduct initial and periodic unannounced searches of any computers, as defined in 18 USC 1030(e)(1), subject to computer monitoring.

These searches shall be conducted for the purpose of determining whether the computer contains any prohibited data, prior to the installation of the monitoring software, to determine whether the monitoring software is functioning effectively after its installation and to determine whether there have been attempts to circumvent the monitoring software after its installation. The defendant shall warn any other people who use these computers that the computers may be subject to searches pursuant to this condition.

The defendant shall submit his property, house, residence,

vehicle, papers, computers, other electronic communications or data storage devices or media or office to a search conducted by a United States probation officer. Failure to submit to such a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

The probation officer may conduct or search under this condition only when reasonable suspicion exists that the defendant has violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

The defendant shall not associate with any child or children under the age of 18 except in the presence and supervision of adults, and adults specifically designated in writing by the probation officer. The probation officer will notify the designated adult of the risk occasioned by the defendant's criminal record or personal history or characteristics. The defendant shall permit the probation officer to make such notifications.

The defendant shall reside in a residence approved in advance by the probation officer. Any changes in the residence must be preapproved by the Court. The defendant shall not reside within 1,000 feet of the real property comprising a public or private elementary, vocational or secondary school or

a public or private college, junior college, university or playground or other housing authority owned by a public housing authority or within 100 feet of a public or private youth center, public swimming pool or video arcade facility without prior approval of the Court.

Based on the defendant's financial position, a fine is not recommended.

The defendant must pay the United States a special assessment of $200.

Now, I think there's a victim restitution payment here?

MS. THOMPSON: Yeah. Per the plea agreement, the defendant has agreed to pay restitution in the amount of $3,000 to Child Victim 1.

THE COURT: All right. And that will -- the Court will award the restitution of $3,000 to Child Victim 1.

MS. THOMPSON: Thank you.

THE COURT: Now, the defendant has executed a plea agreement in which he has specifically waived his right to appeal his sentence. And that plea agreement is in effect and has been accepted by the Court. So there is no appeal available to him.

Now, the Court has sentenced the defendant to a 45-year term of imprisonment, and he is approximately, I believe, 30 years old. And so one wonders why the Court imposed all those conditions of supervision given the very lengthy prison term.

And the reason is that one never knows what's going to happen with sentencing down the road.

The Supreme Court recently -- Congress recently changed and the Supreme Court recently approved changes to sentencing, which caused the Court to have to resentence individuals for certain drug crimes, for instance. And right now there is a Sentencing Reform Act under consideration. I don't know whether it'll apply to this. I doubt it, but it could apply retroactively. The Court never knows.

So while there is no appeal or parole available to the defendant and the chances are he will serve his full 45 years, nonetheless, the Court can't be sure of what might happen 10, 20, 15 years from now. Who knows? And so it's better to have the matter covered.

All right. Is there anything else, Ms. Thompson?

MS. THOMPSON: Your Honor, I believe the Court signed a preliminary order of forfeiture, which was also agreed to in the plea agreement. I would just ask for a final order of forfeiture. And the government will submit that.

THE COURT: Yes. The final order of forfeiture will be entered.

Anything from the defense? Is there a place he would like to serve his sentence?

MR. KIMBROUGH: Yes, Your Honor. He would like to serve it at Seagoville.

THE COURT: Okay. I'll make that recommendation.

MR. KIMBROUGH: Thank you, Your Honor.

THE COURT: Okay. Anything else?

MR. KIMBROUGH: Nothing further.

THE COURT: Nothing? Okay. Court stands in recess.

(Pause)

THE COURT: Yeah. What about that 5,000 JT -- JVTV?

MS. THOMPSON: Oh, that's mandatory if the defendant is not indigent. In this case the government --

THE COURT: He is.

MS. THOMPSON: -- believes he's indigent. So it does not apply.

THE COURT: Okay. I wanted to -- that's what I thought, but I wanted to be sure.

MS. THOMPSON: Sorry. I should have mentioned that.

THE COURT: That's all right. Thank you.

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(Hearing adjourned at 2:11 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: 5/24/2018

/s/ Chris Poage
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